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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1571

SALVATORE SARULLO, and
GARY M. SOLOMON,

Petitioners

versus

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARNG

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PETITION FOR REHEARNG

The petitioners herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 6, 1975, and (2) granting the petition. As grounds for this motion, petitioners state the following:

I

JURISDICTION

This petition for rehearing is filed pursuant to Rule 58 of the Supreme Court rules due to intervening circumstances of substantial effect, SANITARY REFRIGERATOR

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CO., v. WINTERS, 280 U.S. 30, 34, footnote 1; MASSEY v. UNITED STATES, 291 U.S. 608, as well as the presentment of other substantial grounds available to petitioner although not previously presented. SCRIBNER-SCHROTH CO. v. CLEVELAND TRUST CO., 305 U.S. 47, 50.

II

ARGUMENT

(1) COLLATERAL ESTOPPEL, EVIDENTIARY EXCLUSION AND DUE PROCESS DOUBLE JEOPARDY

The government has filed a petition for certiorari in the case of **U.S. v. Phillips,** No. 75-167. This case was relied upon by the petitioners Sarullo and Solomon in their original petition as the Court of Appeals for the Fourth Circuit reversed a subsequent prosecution of a defendant under the federal bank robbery statute and sitting en-banc relied upon collateral estoppel and the evidentiary exclusion rule to justify the decisions rationale. The **Phillips** case presents substantially the same issue as was raised by the petitioners and if the Court grants the **Phillip's** petition and sustains the decision of the Fourth Circuit Court of Appeals, it will be applicable to the petition of Sarullo and Solomon. If one petition is granted, both should be granted due to the striking similarity of the issues now pending before the Court. See **Pickett v. Union Terminal Co.,** 313 U.S. 591.

The government is of the opinion that the issue of collateral estoppel as interpreted by the various circuits is not yet ripe for adjudication. However, the ambiguity of the various decisions in light of **Ashe v. Swenson,** 397 U.S. 436 (1970); **Sealfon v. United States,** 332 U.S. 575

(1948) renders said authority difficult to apply and hazardous for a District Court to factually interpret. A defendant is forced to run the gauntlet several times to test the validity of the authority **U.S. v. Phillips,** No. 75-167 and the cases cited by the petitioners Sarullo and Solomon in their original and supplemental petition lend a great deal of credance to this proposition.

The petition should be granted to incorporate the evidentiary exclusion rule of **United States v. Kramer,** 289 F.2d 909 (2nd Cir. 1961) into the collateral estoppel doctrine and to prohibit the use of any evidence in a subsequent trial that was introduced in a former acquittal trial as an essential ingredient of due process double jeopardy.

(2) THE TRIAL COURT ALLOWED PROSECUTORIAL COMMENT ON THE PETITIONERS SARULLO'S FIFTH AMENDMENT CLAIM OF SILENCE.

The petitioner Sarullo never took the witness stand on his own behalf. Yet, the trial court over objection allowed the government to ask one witness whether Sarullo had claimed the Fifth Amendment at prior civil depositions in related civil suits growing from some of the same transactions and secondly, allowed Sarullo's ex-wife to testify over objection that she overheard a conversation between Sarullo and Solomon and a third party where Sarullo had stated that his lawyer advised him not to discuss the case with anyone. Thirdly, the prosecutor was allowed to ask another witness whether he had ever taken a statement from the petitioners.

These errors were duly presreved and claimed as reversible error before the Sixth Circuit Court of Appeals

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and overruled. They are presented in this petition for rehearing though not presented in the original petition.

The central issue is whether it is a violation of a defendants Fifth Amendment privilege for a prosecutor to elicit responses from witnesses which leave the impression that on prior occasions the defendant claimed his Fifth Amendment privilege where such responses have no real probative value.

It has been held reversible error for a prosecutor to ask a defendant whether upon advice of counsel he had claimed his Fifth Amendment privilege before a Grand Jury, **Grunewald v. United States,** 353 U.S. 391 (1957), and for a co-defendant to comment on his co-defendant's failure to take the witness stand, **United States v. Dela Cruz Bellinger,** 422 F.2d 723 (9th Cir. 1970), cert. denied 398 U.S. 942 (1970). It has further been held plain error to ask a defendant in a subsequent trial whether he had testified at prior trials or claimed his Fifth Amendment privilege, **Stewart v. United States,** 366 U.S. 1 (1961), and to ask a defendant whether he talked to the police at the time of the arrest as such a question constitutes a prosecutorial comment on the claim of constitutional privilege, **Johnson v. Patterson,** 475 F.2d 1066 (10th Cir. 1973), **United States v. Nolan,** 416 F. 2d 588 (10th Cir. 1969), cert. denied 396 U.S. 912 (1969).

Such a procedure denied the petitioner Sarullo a fair and impartial trial as required by due process and constituted a prosecutorial comment on his Fifth Amendment claim of silence.

(3) THE TRIAL COURT'S UNDUE PARTICIPATION IN THE CONDUCT OF THE TRIAL DENIED PETITIONERS A FAIR AND IMPARTIAL TRIAL.

This assignment of error was also preserved by objection, requests for mistrial, argued before the Sixth Circuit Court of Appeals and found not to be reversible error. It was not presented in the original petition for certiorari.

However, throughout the trial, the trial court was very active in cross-examining defense witnesses only and one itme voiced an opinion that a part of the defense proof was irrelevant and not important even though no objection had been raised by the government and the evidence was admitted. A reading of the record will show how clearly the court thought the defendants guilty and this opinion was transmitted to the jury in a thousand subtle ways rendering a fair and impartial trial possible. The court unduly participated in the trial. Any unwarranted or excessive participation by a trial judge which presents a particular bias to a jury is a violation of due process. See **Burstein v. United States,** 395 F. 2d 976 (5th Cir. 1968); **United States v. Nazzaro,** 472 F.2d 302 (2nd Cir. 1973); **United States v. D'Anna,** 450 F. 2d 1201 (2nd Cir. 1971); **United States v. Carmel,** 267 F. 2d 345 (7th Cir. 1959).

This undue participation by the trial court prevented the petitioners from receiving a fair and impartial trial as required by due process.

III

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the orde of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

Edward W. Kuhn

Marvin Goff

F. P. Cribbs, Jr.

Phillip E. Kuhn

Attorneys for Petitioners

CERTIFICATE OF COUNSEL

As counsels for the petitioners, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Edward W. Kuhn

Marvin Goff

F. P. Cribbs, Jr.

Phillip E. Kuhn

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edward W. Kuhn, being one of the attorneys for the petitioners, do hereby state that I have served three copies of this Petition for Rehearing on the Solicitor General of the United States, the Honorable Robert Bork, by placing same in the U. S. Mail, postage pre-paid, to his principle office in Washington, D.C. on the 30th day of October, 1975.

Edward W. Kuhn